Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

REGENIA F. QUINLEY,
Petitioner,

vs.

STATE FARM INSURANCE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the granting of Summary Judgment at the trial level and the affirmance of same by the Eleventh Circuit Court of Appeals given the presumptions that apply in favor of the non-movant, the Petitioner, Regenia F. Quinley, constitute in effect a ruling that Title I of the Americans with Disabilities Act of 1990 prohibiting discrimination in the hiring as to qualified individuals and requiring employers, as the Respondent, State Farm Insurance Corporation, to make reasonable efforts to accommodate the individuals mental or physical limitations as long as those accommodations do not present an undue hardship to the employer; does not prohibit or restrict the removal of reasonable accommodations afforded to a qualified individual so as to cause that otherwise qualified individual working with reasonable accommodations to lose their employment.

2. Given the provisions of Title I of the Americans with Disabilities Act of 1990 prohibiting discriminatory hiring and personnel practices as to private business such as the Respondent, State Farm Insurance Corporation, and the presumptions that apply on behalf of the non-movant, the Petitioner, Regenia F. Quinley, as

the employee on the employer's, State Farm, Motion for Summary Judgment does the granting of Summary Judgment on the trial level before the Southern District of Alabama and the affirmance of same by the Eleventh Circuit Court of Appeals constitute effectively a ruling or finding that the provisions of Title I of the Americans with Disabilities Act of 1990 have no force and affect in prohibiting a situation wherein accommodations existing and affording a qualified individual the ability to move forward with employment are removed so as to place the otherwise qualified individual in a situation of non-accommodation of disability resulting in loss of employment.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Eleventh Circuit are those in the caption (Eleventh Circuit Court of Appeals C.A. No. 96-6798) namely the Petitioner, Regenia F. Quinley, and the Respondent, State Farm Insurance Corporation.

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Petitioner, Regenia F. Quinley, herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on April 22, 1997.

OPINIONS BELOW

The decision of the District Court is unreported. The decision of the Court of Appeals is reported at 113 Federal Reporter 3rd 1251 (Eleventh Circuit 1997)

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals was entered on April 22, 1997. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was invoked under 28 U.S.C. § 1345.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq:

> An employer shall be prohibited from engaging in discriminatory hiring and personnel practices against qualified individuals and shall make reasonable efforts to accommodate individuals mental or physical limitations as long as the accommodations do nor

present an undue hardship to the employer.

42 U.S.C. § 12112(a):

> A.D.A. prohibits employers from discriminating against qualified individuals with disabilities who with or without reasonable accommodations can perform the essential functions of a job.

42 U.S.C. § 12102(2):

> Under A.D.A. an individual is classified as disabled if he or she: Has a physical or mental impairment and the impairment substantially limits one or more of the individuals major activities in life; has a record or history of such an impairment; or is perceived as having such an impairment.

29 C.F.R. 1630.2(h)(1):

> Physical or mental impairment as adopted by the EEOC includes: Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more systems of the body such as the nervous and musculoskeletal system, respiratory organs, cardiovascular system and the glands.

29 C.F.R. 1630.2(I)(Appendix):

> Major life activities as per EEOC adopting the Rehabilitation Act's definition include sitting, standing, lifting and reaching.

29 C.F.R. 1630.2(j)(3)(I):

> A person who is substantially limited would be one

who is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs when compared with an average person having comparable training skills and abilities.

STATEMENT OF THE CASE

Title I of the Americans with Disabilities Act of 1990 prohibiting discriminatory hiring and personnel practices against qualified individuals requires employers to make reasonable efforts to accommodate individuals mental or physical limitations as long as those accommodations do not present an undue hardship to the employers. This law in essence requires private businesses as the Respondent to give persons as the Petitioner, Regenia F. Quinley, with disabilities the same consideration for employment and career advancement that other individuals are afforded and in the process the employer may have to modify its work procedure or the physical features of the workplace to meet the needs of a disabled employee. Title I effective July 26, 1997 applies to the respondent, State Farm Insurance Corporation.

Title I is enforced by the Equal Employment Opportunity Commission which issued regulations July 26, 1991 29 C.F.R. 1630

adopting the definition of the Rehabilitation Act of 1973 as to physical or mental impairments which include psychological disorders or conditions affecting one or more systems of the body to include the musculoskeletal system. Under the Americans with Disabilities Act an individual is classified as disabled if he or she has a physical or mental impairment and the impairement substantially limits one or more of the individual's major activities in life. 42 U.S.C. §12102(2).

Petitioner, Regenia F. Quinley, filed the complaint in the Federal District Court for the Southern District of Alabama on Apirl 3, 1995 alleging violations of Title I of the Americans with Disabilities Act against the Respondent contending that as Mrs. Quinley had performed her job with the Respondent as a secretary not requiring bending, lifting and stooping due to her history of musculoskeletal problems requiring various surgeries prohibiting or limiting bending, lifting or stooping that the shift from the secretaial job not requiring bending, lifting and stooping to a position in mail and file with the Respondent requiring bending, lifting and stooping was, in fact, a failure to accommodate Mrs. Quinley's disability resulting in her being unable to perform the position to which she had

been transferred and her ultimate seperation from the Respondent, State Farm Insurance Corporation.

Respondent filed a Summary Judgment before the Federal District Court for the Federal District Court for the Southern District of Alabama and Summary Judgnment was granted on June 26, 1996 and Notice of Appeal was filed Augusut 9, 1996. The Eleventh Circuit Court of Appeals affirmed on April 22, 1997 the Federal District Court granting of Summary Judgment as per Eleventh Circuit Court Rule 36-1 mandate being issued May 22, 1997.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW AS TO THE EXTENT TO WHICH THE AMERICANS WITH DISABILITIES ACT OF 1990 SPECIFICALLY TITLE I THEREOF PROHIBITS DISCRIMINATORY HIRING AND PERSONNEL PRACTICES AGAINST QUALIFIED INDIVIDUALS REQUIRING EMPLOYERS SUCH AS THE RESPONDENT, STATE FARM, TO MAKE REASONABLE EFFORTS TO ACCOMMODATE INDIVIDUALS MENTAL OR PHYSICAL LIMITATIONS AS LONG AS THOSE ACCOMMODATIONS DO NOT PRESENT AN UNDUE HARDSHIP TO THE EMPLOYER.

Regenia F. Quinley filed the complaint April 3, 1995 alleging violations of the Americans with Disabilities Act against State Farm

Insurance Company. State Farm filed a motion for extension of time for responding to the complaint on May 17, 1995 which motion was granted on May 19, 1995.

Regenia Quinley became employed with State Farm Insurance in November 1985 as a C3 (Secretary) which job did not require lifting, bending or stooping. After being hired Mrs. Quinley was involved in two automobile accidents in 1986 and 1992 and sustained back injuries resulting from those accidents restricting her ability to bend, lift or stoop. During this time frame, her employer, State Farm, accommodated her back injury by allowing her to continue to function as a secretary not requiring bending, lifting to stooping. Mrs. Quinley was able to handle the secretarial position with those accommodations. After the second automobile accident, September 11, 1992, State Farm's regional medical director, James Abroms, communicated with Mrs. Quinley's physician, Dr. Bridges, on September 11, 1992 confirming that State Farm knew that Mrs. Quinley had missed some time from work because of illness and asking for Mrs. Quinley's diagnosis and <u>limitations</u> which letter suggested to Dr. Bridges (Emphasis Supplied):

> "We do not under any circumstances want to put Mrs. Quinley under any excess strain which could be injurious to her health. I appreciate your attention to these points." (R1-12, Folder 1, Exhibit 2)

Dr. Bridges responded by submitting medical notes dated September 15, 1992 referencing low back pain for Mrs. Quinley which was worse which notes submitted to Dr. Abroms as the medical director for State Farm suggested in part as follows:

> "I believe the answer to her problem is to change her activities. I am making plans for her to have a one time half day visit to a back instructional program. Hopefully she can begin an exercise program for her back. She needs to change her activities at work, such as constant sitting, and a program of walking twice a day. I have recommended that she work half days only for another week. If she has increasing difficulty, I would like to see her again."

In addition during this time frame, Dr. Abroms received MRI results on the lumbar spine from Dr. Bridges showing disc bulges at L3-4, L4-5.

Notwithstanding the fact that as of the Summer 1993 Dr.

Abroms as Regional Medical Director of State Farm had been advised that Mrs. Quinley was having back problems and had bulging discs at two levels as a result of two automobile accidents, in the Summer of 1993, specifically on June 1, 1993, Mrs. Quinley was shifted to a mail and file clerk position which was a lateral move requiring substantial lifting, bending and stooping.

After that move, Mrs. Quinley was involved in another automobile accident on August 20, 1993 giving rise to the submission by Dr. Ray of a medical report dated November 22, 1993 indicating that Mrs. Quinley had strained her back following the accident on August 20, 1993 and had not been able to return to work. Further, during that time frame, a Myelogram/Lumbar exam was submitted to State Farm dated September 29, 1993 indicating that Mrs. Quinley had lumbar strain, low back pain and bulging discs at L3-5, L4-5 and L5S1 and Dr. Ray submitted a report on September 20, 1993 that Mrs. Quinley was under his care following a motor vehicle accident and was not able to work.

During this time frame, Mrs. Quinley continued to try to work in the mail and file clerk position requiring substantial lifting, bending

and stooping unlike the C3 Secretarial position that she had been laterally moved from.

On January 26, 1994, Dr. Ray sent a letter to State Farm providing:

> "To whom it may concern, I feel that although Mrs. Quinley is largely improved from the aggravating factors of the accident of August 1993, and her presenting complaints in September she certainly has a tendency toward easy aggravation, easier aggravation than before. She does have at least three bulging lumbar discs which may eventually require additional investigation and treatment. I recommend that she not be expected to do any heavy lifting. She will have to be extremely careful about excessive bending and positioning. She needs to get up and move around fairly frequently in order to avoid stiffness and strain in the low back."

To that correspondence Dr. Abroms, on behalf of State Farm, sent a letter of February 22, 1994 confirming that they (State Farm) understood that Mrs. Quinley had significant restrictions placed on her because of her back pain and herniated, bulging discs and that:

> "We at State Farm do not want to put Mrs. Quinley at any increased risk to

> hurting herself. To that end we would like to update her condition and her restrictions. In addition, any information about her prognosis would be greatly appreciated.
>
> Our main concerning is not to put Mrs. Quinley in a position where she could hurt herself and, with your help, we will try to do just that."

To Dr. Abroms correspondence, Dr. Ray responded February 25, 1994 confirming bulging discs for Mrs. Quinley at three levels L3-5, L4-5 and L5S1 as noted on the CT Scan done September 29, 1993 and the aggravation of those conditions by the recent motor vehicle accident which was the third motor vehicle accident she had been involved in confirming as follows:

> "All of this has been aggravated by a motor vehicle accident that she was involved in. She is doing must better but still has episodes of distress from the waist up and as this is aggravated by bending and lifting, she does okay with sitting because she gets up and down frequently but lifting really throws her into a spasm.
>
> I feel that she has largely improved from the aggravating factors of the accident of August 1993 but she does have a tendency towards easy

> aggravation. She does have at least three bulging lumbar discs which may eventually require additional investigation and treatment. I recommend that she not be expected to do any heavy lifting and she will have to be extremely careful about excessive bending and positioning. She needs to get up and move about fairly frequently to avoid stiffness and strain in the low back."

Following Dr. Ray's letter of February 25, 1994 to Dr. Abroms, Mrs. Quinley was kept in the mail and file position requiring bending, lifting and stooping. Subsequently, Mrs. Quinley fractured her right hand and Dr. Ray submitted a report wherein, again, Mrs. Quinley was restricted from doing excessive bending or heavy lifting for two months until the fracture healed. Those notes indicate in part as follows:

> "Regenia Quinley has been working with State Farm for 8 years. she says they keep trying to make her lift things. It hurts her back..."

Subsequent to this correspondence by and between Dr. Abroms, Mrs. Quinley was kept in the mail and file clerk position requiring excessive bending, lifting and stooping and Mrs. Quinley

took sick leave in August 1994 as during that time frame work in the mail and file position had aggravated her back. During sick leave, she fractured her foot and Dr. Ray submitted additional reports to State Farm that she could only return to light duty work and should be restricted from prolonged walking standing, squatting, climbing, which was confirmed by letter from Dr. Ray to Dr. Abroms October 12, 1994.

During this time frame, Mrs. Quinley was not allowed to return to her C3 position not requiring bending, lifting and stooping although she had clearance from Dr. Ray of October 6, 1994 to return to light duty work on October 10, 1994.

Mrs. Quinley, upon presenting that clearance and requesting the C3 non-bending,. lifting or stooping position, was refused that position and told to return home on or about October 10, 1994 during which time she filed the EEOC complaint on October 14, 1994.

After filing the EEOC Complaint October 10, 1994, Mrs. Quinley was offered a position at State Farm in January 1995 which again was the mail and file clerk position requiring bending, lifting

and stooping which she could not perform.

On the Federal District Court's granting of Summary Judgnment on behalf of the Respondent, the Eleventh Circuit's review of that ruling was plenary and the Eleventh Circuit should not affirm the Federal District Court's granting of Summary Judgment unless, after construing the evidence in a light most favorable to the non-moving party, the Petitioner, the Eleventh Cirucit concluded that no genuine issue exists as to material fact and that the moving party was entitled to judgment as a matter of law. C.B. By and Through Breeding vs. Driscoll, 82 F. 3d 383, 386 (11th Cir 1996).

Pursuant to Rule 56c of the F.R.C.P. State Farm would be entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Rice vs. Branigar Organization, Inc. 922 F. 2d 788, 790 (11th Cir. 1991) (citing Anderson vs. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

State Farm's burden was to show there was no genuine issue

of material fact to be decided at trial. Clark vs. Coats and Clark, Inc., 929 F. 2d 604, 608 (11th Cir. 1991). Upon such a showing, the burden would shift to the non-moving party, Mrs. Quinley, to establish the existence of material issues of fact that would preclude summary judgment. If State Farm could establish that Mrs. Quinley would be unable as a matter of law to establish an element of her case or her cause of action, State Farm would be deemed to meet its burden under a motion for summary judgment. Celotex Corporation vs. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L.Ed. 2d 265, 575 (1986); Real Estate Financing vs. Resolution Trust Corporation, 950 Fed. 2d 1540 (11th Cir. 1992).

This Court's standard of review for a judgment as a matter of law is *de novo*. Colvin vs. Housing Authority of Sarasota Florida, 71 F. 3d 864, 866 (11th Cir. 1996). Further, on granting of summary judgment this Court reviews:

> "On summary judgment the inferences are drawn from the underlying facts contained in such materials (affidavits, depositions, exhibits) and must be viewed in a light most favorable to the party opposing the motion and we look at the record on summary judgment in

> a light most favorable to the party opposing the motion." (See U.S. vs. Diebold, Inc., 1962 82 S. Ct. 993, 369 U.S. 654 8th L. Ed. 2d 176; Poller vs. Columbia Broadcasting Systems, Inc., 1962 82 S. Ct. 486, 491 368 U.S. 464 7th L. Ed. 2d 458).

Regenia F. Quinley, was employed by State Farm in 1985 and performed her position as a secretary not requiring bending, lifting and stooping up until June 1993. In the interim time, Mrs. Quinley had two automobile accidents which are documented as causing her to have bulging discs at two or three levels and restricted her activities in regard to bending, lifting and stooping. These medical records and condition of Mrs. Quinley were documented and had been filed with State Farm.

Notwithstanding that information, Mrs. Quinley was shifted, in the Summer of 1993, specifically June 1993, to a lateral position requiring bending, lifting and stooping. After that shift to a position requiring bending, lifting and stooping which she could not perform due to her pre-existing lower back problems resulting from pre-existing automobile accidents she was involved in a third automobile

accident in August 1993 aggravating her existing back condition.

Mrs. Quinley's major life activities namely bending, lifting or stooping were substantially limited based on the three automobile accidents and the aggravation of the back condition that she had. Major activities are defined at 29 C.F.R. 6030.2(I) as including walking, working, sitting, standing and lifting. Accordingly, as per 42 U.S.C. § 12112, Mrs. Quinley had a physical impairment limiting a major activity. Mrs. Quinley was shown to have been able to perform her job as secretary from 1986 to 1993 not requiring bending, lifting or stooping which was a reasonable accommodation afforded to her so as to allow her to perform the essential functions of her job as a C3 secretary. (See 42 U.S.C., § 12111(a).

On verification to Dr. Abroms by Mrs. Quinley's treating physicians that due to the three automobile accidents, her back was in such a shape that she could not bend, lift or stoop, Mrs. Quinley was shifted laterally out of that position which she could perform into a mail and file clerk position June 1993. The shift of Mrs. Quinley to a job requiring bending, lifting or stooping, given her physical restrictions known to State Farm, did not constitute a reasonable

accommodation of Mrs. Quinley's disability as per 29 C.F.R. 1630.2(o)(2).

Accordingly, State Farm's shifting of Mrs. Quinley out of a position that she could hold, notwithstanding her back injures, to a position she could not perform all with knowledge constitute on behalf of State Farm, discrimination against Mrs. Quinley as a qualified employee as per 42 U.S. C. § 12112(a) and the conduct of State Farm with notice of Mrs. Quinley's disability all of which was documented with State Farm's medical director evidenced an intent and pattern of failing to provide reasonable accommodation for Mrs. Quinley. In fact, the conduct of State Farm shows the total reverse of reasonable accommodations as State Farm, rather than analyzing Mrs. Quinley's job, her back problems and providing essential and potential accommodations that would enable Mrs. Quinley to continue to perform her job tasks as per 29 C.F.R. 1630.9 (appendix) did just the reverse.

In assessing State Farms liability, it must be determined whether or not Mrs. Quinley was a qualified individual with a disability to whom State Farm owed a duty to provide reasonable

accommodations to provide Mrs. Quinley's known disabilities and whether there were issues of material fact in this case as to Mrs. Quinley's disability and knowledge thereof by State Farm and failure to accommodate Mrs. Quinley's disability with reasonable accommodations which would preclude the granting of summary judgment in favor of State Farm Insurance Corporation the employer.

Mrs. Quinley started work in 1985 and performed her work as a C3 secretary without bending, lifting and stooping being required. After 1985, over a period of seven years she was involved in three automobile accidents and in September 1992, Dr. Abroms, on behalf of State Farm became so concerned about Mrs. Quinley's medical condition that he inquired of her physician as to her diagnosis, prognosis and limitations so as not to "put Mrs. Quinley under an excessive strain which could be injurious to her health". That specific inquiry of Dr. Bridges brought about a response that the solution for Mrs. Quinley would be to have her attend a back instructional program, begin an exercise program and change her activities at work such as constant sitting and a program of walking twice a day.

Notwithstanding that correspondence and the fact that Mrs. Quinley had been able to perform her job as a C3 secretary not requiring bending, lifting or stooping, for seven years, she was transferred laterally June 1, 1993 to a position requiring bending, lifting and stooping. After that transfer, Dr. Ray continued to submit reports indicating that Mrs. Quinley was under his care for back strain and on January 26, 1994 submitted a report confirming that although she was recovering from the August 1993 accident (third accident) she had three bulging lumbar discs and should not be required to do any heavy lifting and should be careful about excessive bending and positioning. That report of January 26, 1994 was consistent with the MRI reports of September 1992 and September 1993 submitted to State Farm confirming Mrs. Quinley's disc herniations at three levels. After all of that, Dr. Abroms responded February 22, 1994 confirming that they (State Farm) understood that Mrs. Quinley had significant restrictions placed on her because of her back pain and herniated bulging discs and did not want to place Mrs. Quinley at any increased risk of hurting herself and that State Farm's "main concern was not to put Mrs. Quinley in a position where she

could hurt herself and with your help we will try to do just that". Dr. Ray responded promptly to that request of Dr. Abroms on February 25, 1994 confirming again bulging discs at three levels for Mrs. Quinley and restricting her from heavy lifting and requiring that she be careful about excessive pending and positioning and sent office notes May 9, 1994 confirming that Mrs. Quinley continued to complain of back pain and could not lift things at State Farm as it hurt her back.

Notwithstanding, that correspondence from Mrs. Quinley and from her physician to Dr. Abroms, State Farm's medical director, she was kept in the mail and file clerk position to which she had been transferred June 1, 1993 requiring bending, lifting and stooping.

In August 1994, Mrs. Quinley took medical leave as her back condition had worsened and she had injured her ankle.

Mrs. Quinley supplied a return to work certificate from Dr. Ray returning her to light duty work on October 10, 1994. Upon presenting that, Mrs. Quinley was told to "go home". Four days later Mrs. Quinley filed the EEOC complaint and four months later she was offered the job back at State Farm as a mail and file clerk

requiring bending, lifting and stooping, which she could not perform.

Thusly, there are at least substantial material issues of fact in this case as to whether State Farm with knowledge of Mrs. Quinley's disability related to her back injures and her inability to bend, lift or stoop, engaged in a pattern of conduct evidencing an intent to not reasonably accommodate Mrs. Quinley's disability and to find a way to terminate her. Mrs. Quinley's medical condition had been repeatedly documented with State Farm through its medical director and notwithstanding that documentation she was shifted to a position which called for her doing those things, that is, bending, lifting and stooping which had not previously been required and which she was not able to engage in due to her automobile accidents. Accordingly, Mrs. Quinley was a qualified individual with State Farm with seven years of employment who could have and was willing to continue that employment at the time of the transfer to a position she could not perform due to her disability.

At the time of the transfer of Mrs. Quinley in June 1993, at a time that Mrs. Quinley had exhibited the fact that she was a qualified individual with a disability who could perform due to her skills and

experience the position of C3 not requiring bending, lifting and stooping, State Farm was knowledgeable about the limitations on Mrs. Quinley's physical abilities and notwithstanding that knowledge caused her to be transferred June 1993.

After the transfer, State Farm continued to be informed, at the specific request of the its medial director, of Mrs. Quinley's limitations on bending, lifting and stooping and notwithstanding that information, failed to make any reasonable accommodations for Mrs. Quinley. In fact, in this case, when Mrs. Quinley attempted to return to work on October 10, 1994 with a certificate from Dr. Ray that she could return to light duty work she was told to "go home" and within a few days thereafter received a letter from Mr. Marquardt indicating that unless they received all medical information by October 28, 1994 she would be terminated. Of course, at that time, not only had State Farm not reasonably accommodated Mrs. Quinley's disability, but State Farm had all the medical records, they knew the scope and extent of her back problems and they knew that she could perform work as a secretary not requiring bending, lifting and stooping and continued to insist on a position requiring those things.

When construing all the evidence in a light most favorable to Mrs. Quinley at the minimum there are certainly genuine issues as to material facts in this case concerning the scope and extent of Mrs. Quinley's disability and knowledge thereof by State Farm and the failure by State Farm to act on that knowledge and to reasonably accommodate Mrs. Quinley as a qualified employee and the pattern and practice of State Farm in refusing to accommodate and refusing to allow Mrs. Quinley to return to the work that she could work at in October 1994 and documenting subsequent to her threatened termination a work capacity evaluation labeled as "independent".

It is respectfully submitted that the facts in this case when construed on summary judgment in favor of Mrs. Quinley indicate a pattern of practice by State Farm to ignore Mrs. Quinley's back problems, place her in a position she could not work at and continue to pressure her to supply medical information that she had already supplied, refuse to honor her doctor's light duty return to work order of October 10, 1994 and after Mrs. Quinley files an EEOC complaint October 14, 1994 to attempt to justify its position by a work hardening evaluation that in and of itself contains gross inaccuracies

and inconsistencies showing material issues of fact.

As in Tuck vs. HCA Health Services of Tennessee, Inc. d/b/a HCA Donaldson Hospital (D.C.M. Tennessee 6-4-92), 3 AD Cases 517 an ex-Registered Nurse having a back injury who could not perform all the essential duties of the job working in the progressive care unit because she could not lift heavy objects was otherwise qualified for Registered Nurse positions elsewhere in the hospital and could have performed essential functions with reasonable accommodations although the hospital did not offer her another positions when it terminated her. This conduct by the employer constituted a violation of the ADA.

In this case, Mrs. Quinley having a back injury, could and did perform her job as secretary not requiring bending, lifting and stooping. Notwithstanding that performance, she was shifted laterally to a position requiring bending, lifting and stooping and notwithstanding the express desire of State Farm to accommodate her as per correspondence from Dr. Abroms and Mr. Marquardt, State Farm continued to keep her in a position requiring bending, lifting and stooping notwithstanding bulging discs at three levels.

Again, it is respectfully submitted that construing the evidence in favor of Mrs. Quinley, these facts create at least substantial issues of fact and mandate the reversal of this case on the trial court's granting of summary judgment for State Farm. State Farm knew or should have known that Mrs. Quinley was qualified to return to work as a secretary, October 10, 1994 as per Dr. Ray's certificate. As in Perez vs. Philadelphia Housing Authority (D.C. Eastern Pennsylvania 12-7-87) 1 AD Cases 1170, the employer knew or should have known that the receptionist/clerk who suffered a back injury consisting of severe lumbar sacral sacroiliac sprain was "otherwise qualified" to return to work part time so long as she could receive accommodations which would not have been expensive or impractical. In this case, certainly the accommodation Mrs. Quinley was asking was to work as she had worked for seven years as a secretary and not be required to bend, lift or stoop which request was neither expensive or impractical.

Factual issues exist in this case as to the motivations of State Farm and the ability of Mrs. Quinley to return to work with reasonable accommodations and the effort of State Farm to

accommodate Mrs. Quinley, if any. Those same factual issues in Stradley vs. LaFourche Communications, Inc. (D.C. Eastern Louisiana 11-14-94) 3 A.D Case 1507 negated summary judgment where there was a question as to whether the employee who had been diagnosed as unable to return to work was capable of performing essential job functions and regular attendance with accommodation of transfer from a supervisory position to a less stressful position of cable installer.

Again, here Mrs. Quinley had performed her job as secretary not requiring bending, lifting and stooping and had been laterally transferred to a position requiring that and was simply asking to return to a position not requiring bending, lifting and stooping which she had performed in the past and could perform in the future and which would not have been burdensome to State Farm.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS DECISION AFFIRMING THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT GIVEN THE PRESUMPTIONS THAT APPLY ON MOTION FOR SUMMARY JUDGMENT PRESENTS A DIRECT CONFLICT WITH THE PROVISIONS OF 42 U.S.C. § 1210 ET SEQ.

A. The Petitioner having presented evidence or ability to

hold down a position with the Respondent, State Farm Insurance Corporation, notwithstanding having a long established disability with reasonable accommodations had those accommodations removed by being required to shift to a position involving lifting, bending or stooping which the Petitioner could not perform which conduct on behalf of the Respondent, State Farm Insurance Corporation, evidenced a failure to reasonably accommodate the Petitioner all in violation of the requirements of Title I of the Americans with Disabilities Act of 1990.

The argument presented in support of Reasons for Granting the Writ I are adopted and incorporated herein specifically by reference in support of Reasons for Granting the Writ IIA.

B. The Respondent's Motion for Summary Judgment raised in and of itself material issues of fact as to the Petitioner's disability as the Petitioner being a qualified individual requiring accommodation due to physical limitations all of which, given the presumptions that apply on Motion for Summary Judgment in favor of the non-movant, the Petitioner, and specifically the provisions of Title I of the Americans with Disabilities Act of 1990 required a factual development denied by the granting of the Motion for Summary Judgment on behalf of the Respondent, State Farm Insurance Company.

The argument presented in support of Reasons for Granting the Writ I are adopted and incorporated herein specifically by reference in support of Reasons for Granting the Writ IIB.

III. THE COURT OF APPEALS IN UPHOLDING THE MOTION FOR SUMMARY OF THE RESPONDENT, STATE FARM INSURANCE COMPANY, AFFECTIVELY HELD THAT THE AMERICANS WITH DISABILITIES ACT OF 1990 DID NOT PROHIBIT THE REMOVAL OF REASONABLE ACCOMMODATION FOR A QUALIFIED EMPLOYEE ALL IN VIOLATION OF THE SPECIFIC PROVISIONS OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT OF 1990.

The argument presented in support of Reasons for Granting the Writ I are adopted and incorporated herein specifically by reference in support of Reasons for Granting the Writ III.

CONCLUSION

Title I of the A.D.A. requires employers to refrain from discriminating against qualified individuals with disabilities who with or without reasonable accommodations could perform the essential functions of their job, 42 U.S.C. 12112(a). Under the A.D.A. the Petitioner qualifies as a person having a physical impairment including a psychological order or condition as on numerous documented occasions she required surgery affecting her musculoskeletal system (29 C.F.R. 1630.2(h)(1); 42 U.S.C. 12102(2))

Limitations on substantial major life activities of Mrs. Quinley namely her ability to lift, stoop and bend clearly fall,

according to EEOC guidelines. 29 C.F.R. 1630.2(I), within the definition of "major life activities".

In regard to Mrs. Quinley's work, she was a person who was substantially limited a she was restricted in her ability to perform a class of jobs or broad range of jobs involving bending, lifting and stooping given her disability. (29 C.F.R. 1630.2(j)(3)(I))

The Respondent was familiar with Mrs. Quinley's restrictions on her ability to bend, lift and stoop although s he could perform her duties as a C3 Secretary not having to bend, lift or stoop. According to EEOC guidelines and regulations. (29 C.F.R. 1630.2(j)(Appendix) Even though Mrs. Quinley was not completely unable to work, she qualified as having a condition that would significantly restrict her ability to perform a range of work involving bending, lifting or stooping. Mrs. Quinley was in a position and had performed that job for in excess of nine years not requiring bending, lifting and stooping and notwithstanding notice to the Respondent of her musculoskeletal problems and her surgeries related thereto and her inability to bend, lift and stoop, she was transferred to a position requiring bending, lifting and stooping so that rather than accommodating Mrs.

Quinley's disability, additional impediments were placed in front of her resulting in not being able to perform that job ultimately resulting in her separation from State Farm Insurance.

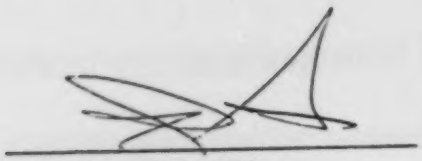
Mrs. Quinley to qualify for A.D.A. protection must have a record of having had a "substantially limiting" impairment and evidence of same could include medical records which in this case State Farm clearly had. (29 C.F.R. 1630.2(k)(Appendix) Mrs. Quinley was a qualified individual with a history of a disability who had performed her job as a secretary for nine years not requiring bending, lifting or stooping therefore was performing the essential functions of her job (42 U.S.C. § 12111(8); 29 C.F.R. 1630.2(m)(Appendix); 29 C.F.R. 1630.2(n)(2))

It is respectfully submitted that if, in fact, Title I of the Americans with Disabilities Act of 1990 is to be applied evenhandedly so as to prohibit the failure to accommodate a person with disabilities it must be also applied evenly to Mrs. Quinley prohibiting the placing of impediments before Mrs. Quinley when in fact she had performed her job as a secretary not requiring lifting, bending and stooping for some seven years. Put another way, if Title

I of the Americans with Disabilities Act of 1990 requires affirmative accommodations be given to someone with a documented disability certainly that act must be taken to prohibit the placing of impediments and/or the removal of accommodations so as to put a person with disabilities in the position of not being able to perform a job otherwise performable with reasonable accommodations. (29 C.F.R. 1630.2(o)(1).

If, in fact, Title I of the Americans with Disabilities Act of 1990 requiring reasonable accommodations for disabled employees is to be applied so as to prohibit the failure to make reasonable accommodations for disabled employees it must be applied in this case to Mrs. Quinley as Mrs. Quinley, even through disabled and restricted as to bending, lifting or stooping could perform and had performed satisfactorily her position as a secretary for some seven years and affectively was forced out of her job by being shifted from that position to a position in which she could not perform given her disability.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.



IRVING SILVER

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6798
Non-Argument Calendar

D.C. Docket No. 95-0271-RV-C

Regenia F. Quinley,
Plaintiff-Appellee,

v.

STATE FARM INSURANCE CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

(April 22, 1997)

Before HATCHETT, Chief Judge, DUBINA and BARKETT, Circuit Judges.

AFFIRMED. See 11th Circuit Rule 36-1.

"Costs taxed against plaintiff-appellant."

Entered: April 22, 1997
For the Court: Miguel J. Cortez,
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No. 95-0271-RV-C

REGENIA F. QUINLEY,

Plaintiff,

v.

STATE FARM INSURANCE CORP.,

Defendant.

ORDER

In this case, plaintiff Regenia F. Quinley charges that defendant State Farm Insurance Corporation ("State Farm") discriminated against her in violation of the Americans with Disabilities Act ("ADA"), 42 U>S.C. § 12101, et seq. The matter is presently before the Court on State Farm's motion for summary judgment and supporting brief (tabs

12 & 13). Ms. Quinley has filed a response in opposition to defendant's motion. See tabs 24, 25 & 26. State Farm has filed a reply (tab 27) along with a "motion to strike the affidavit of plaintiff Regenia Quinley" (tab 28).

This case is also before the Court on State Farm's "motion for continuance of pretrial conference" (tab 29). Ms. Quinley filed a response (tab 30) in opposition to this motion. Subsequently, however, Ms. Quinley withdrew her objection and consented to the continuance. See tab 31. The Court will address these motions in logical order.

I. Background

State Farm's claims office in Mobile, Alabama, hired Ms. Quinley as a claims secretary in 1985. She remained in that position until June 1993, when she was assigned to a job as a mail and file clerk. In late July 1994, Ms. Quinley began a continuous medical leave of absence for a sleep disorder. She asked to return to work on October 10, 19943, but State Farm delayed her return until it obtained an independent "fitness for duty"evaluation to determine her ability to perform her job duties. Ms. Quinley returned to work on January 16,

1995 but was terminated approximately three weeks later on February 6, 1995.

During the time she was employed by State Farm, Ms. Quinley experienced a wide variety of physical and psychological problems. The most significant of these was pain stemming from a back injury sustained in a September 1986 automobile accident, and aggravated in two subsequent car accidents in August 1992 and September 1993. In addition to the back injury, Ms. Quinley suffered a broken hand, migraine headaches, periodic chest congestion and bronchitis, "pathological grief reaction," depression, multiple syncopal episodes, diarrhea, abdominal cramps, sinusitis, high blood pressure, and a host of other ailments.

Ms. Quinley's medical and psychological problems caused her to be absent from work frequently. In 1990, these problems caused her to miss all or part of 34 work days; in 1991, all or part of 27 work days; and in 1992, all or part of 60 work days. In 1993, Ms. Quinley was absent all or part of 40 work days before her third automobile accident occurred in September 1993.

On July 25, 1994, she began a 2 1/2 month medical leave because of a sleep disorder. While on medical leave, Ms. Quinley feel off a swing at home and fractured her foot, requiring an extension of her leave. Between her third car accident in September 1993 and when she first sought to return to work from medical leave on October 10, 1994, Ms. Quinley missed all or part of 177 work days.

On October 14, 1994, Ms. Quinley filed a charge of disability discrimination with the Equal Employment Opportunity Commission ("EEOC") asserting the following:

> I. I was hired by (State Farm) in November 1985. I have been denied reasonable accommodations and on October 10, 1994 was denied the opportunity to return to work following a medical leave of absence.
>
> II. No reasons have been offered for these actions.
>
> III. I believe I have been discriminated against because of my disability, in violation of the Americans with Disabilities Act, in that I was treated in this manner.

On February 7, 1995, the EEOC issued Ms Quinley a "notice of right to sue." On April 3, 1995, she commenced the instant action.

II. DISCUSSION

A. Jurisdiction

The Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343. Venue is appropriate in this judicial district pursuant to 28 U>S.C. § 1391(b).

B. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c);see Rice v. Branigar Org., Inc., 922 F.2d 788, 790 (11th Cir. 1991). The clear language of Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The party moving for summary judgment

bears the initial burden to show the district court, by reference

to materials on file, that there are no genuine issues of material that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991); see mercantile Bank & Trust Co. v. Fidelity & Deposit Co., 750 F.2d 838 (11th Cir. 1985). The mere existence of a scintilla of evidence in support of the non-movant's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). At all times, however, the Court must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences and resolving all reasonable doubts in her favor. Addickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Barnes v. Southwest Forest Indus., 814 F.2d 607, 609 (11th Cir. 1987).

C.Conclusions of Law

1. Scope of ADA claim

The ADA is a federal statue that prohibits employment discrimination against disabled individuals. Title I of the ADA, under

which Ms. Quinley's claims fall, incorporates by reference the enforcement mechanisms provided for in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. See 42 U.S.C. § 12117(a). A claimant who wishes to bring a Title VII action in federal Court must first file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e). Title VII further provides that "a civil action may be brought against the respondent named in the charge...by the person claiming to be aggrieved" within ninety days of receipt of a "right-to-sue" letter from the EEOC. 42 U.S.C. § 2000e-5(f)(1).

Although the timeliness of filing an EEOC charge is in the nature of a statue of limitations, see Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982), the act of filing is a jurisdictional prerequisite to the commencement of a Title VII, or ADA, suit in federal court, see Thomas v. Kroger Co., 24 F.3d 147, 15k0 (11th Cir. 1994). Thus, unless a plaintiff has filed a charge with the EEOC and received a right to sue letter, the district court lacks subject matter jurisdiction to hear

that plaintiff's ADA claim. See Stewart v. County of Brown, _F.3d_, No. 95-2776, 1996 WL 313212 (7th Cir. June 12, 1996); McSherry v. Trans World Airlines, Inc., 81 F.3d 739 (8th Cir. 1996); Redlich v. Albany Law School of Union University, No. 94-CV-1021, 1995 WL 581244, at *2 (N.D.NY. Oct. 3, 1995).

Here, State Farm accurately notes that although Ms. Quinley has received a right to sue letter, the precise claims of disability discrimination covered by the letter or by the complaint are unclear. Consequently, State Farm articulates what it perceives are all the claims Ms. Quinley could possibly be intending to assert here. These are: (1) a claim that her reassignment from claims secretary to mail and file clerk in June 1993 was discriminatory because while she could perform the duties of the former position, her back condition prevented her from performing certain duties of the latter; (2) a claim that State Farm discriminated against her by delaying her return to work after her 1994 medical leave of absence; and (3) a claim that her termination on February 6, 1995 was discriminatory.

Having thus stated Ms. Quinley's potential claims, State Farm

contends that only the second is properly before the Court. Specifically, State Farm argues that the first potential claim is time barred because Ms. Quinley filed her only EEOC charge on October 14, 1994, well over 180 days after her June 1993 reassignment and that the third potential claim is barred because Quinley never filed an EEOC charge related to her discharge.

The Court finds State Farm's articulation of the possible claims here helpful, but disagrees with defendant regarding the viability of the first potential claim stated. It is inferable from Ms. Quinley's EEOC charge, and clear from her complaint, that she is asserting that State Farm denied her a reasonable accommodation for her alleged disability by its ongoing failure or refusal to reassign her to her old secretarial position. The first potential claim set forth above is merely a statement that her removal from that position in the first place was discriminatory. As such it states a claim of alleged discrimination that was ongoing at the time Ms. Quinley filed her EEOC charge and, thus, it is time barred. See Stewart, 1996 WL at *3 ("In order to benefit from the "continuing discrimination: theory, (a plaintiff) must show that the alleged untimely

act (the transfer) the timely act (the failure to accommodate his physical disability) are related enough to constitute a continuing violation.") (quoting Selan v. Kiley, 969 F.2d 560, 564-65 (7th Cir. 1992).

The Court concurs with State Farm regarding the third potential claim, however. Ms. Quinley was fired on February 6, 1995, which was not only several months after she filed her EEOC charge, but also only one day before the EEOC issued her a notice of right to sue. Obviously, that right to sue letter could not cover a claim for her discharge.

Thus, the Court finds that it has two ADA claims before it. First, that State Farm discriminated against Ms. Quinley by removing her from her secretarial position and failing to accommodate her alleged disability by reassigning her to that position. Second, that State Farm discriminated against Ms. Quinley by delaying her return to work following her 1994 medical leave of absence.

2. **Prima facie case under the ADA**

The ADA provides that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual (in any of the) terms, conditions (or) privileges of

employment." 42 U.S.C. § 12112(a). Indeed, the ADA requires such employers to provide reasonable accommodations for known disabilities unless doing so would result in an undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A). "In order to establish a prima facia case of discrimination in violation of the ADA, a plaintiff must prove that (1) she has a disability; (2) she is a qualified individual; and (3) she was subjected to unlawful discrimination because of her disability." Morisky v. Broward County, 80 F.3d 445, 447 (11th Cir. 1996).

A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds." 42 U.S.C. § 12111(8). A "disability" is "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment." 42 U.S.C. § 12102(2). The ADA does not define such terms as "physical or mental impairment," "major life activity," or "substantially limits." Instead, these definitions are found in the regulations Congress directed the

EEOC to issue to implement the statue. See 42 U.S.C. § 12116 (providing EEOC with authority to issue implementing regulations); 29 C.F.R. Pt. 1630, Appendix to Part 1630--Interpretive Guidance to Title I of the ADA.

Under the EEOC regulations, "physical impairment" is defined as "(a)ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." 29 C.F.R. § 1630.2(h)(1). "Mental impairment" means "a)ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2). "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. 1630.2(i).

"If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life

activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." 29 C.F.R. § 1630, App., § 1630.2(j) (explanatory footnote added). "To determine whether a person is substantially limited in a major life activity other than working, we look to whether that person can perform the normal activities of daily living." Ray v. Glidden, No. 95-11162, 1996 WL 284978 (5th Cir. June 14, 1996); see Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 & n.11 (5th Cir. 1995) (plaintiff who sustained serious injury arm in gun accident not disabled under ADA where she could "feed herself, drive a car, attend her grooming, carry groceries, wash dishes, vacuum, and pick up trash" and attend to "all of the basic things" but where she was restricted from heavy lifting and repetitive rotational movements, and could not "pick up little things from the floor,...ha(d) trouble holding things up high or real tight for long period of time, and...sometimes ha(d) problems turning the car's ignition"). With respect to the major life activity of working.

(t)he term substantially limits means significantly restricted in the

ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3).

The primary ground on which State Farm seeks summary judgment here is its assertion that Ms. Quinley is not disabled for purposes of the ADA. Although Ms. Quinley suffered a multitude of illnesses and injuries during the time she worked for State Farm, her ADA claims are founded on her back problem. State Farm concedes that Ms. Quinley's bulging discs constitute a physical impairment, but contends that she cannot produce evidence that her impairment "substantially limits" any major life activity, including her ability to work.

In support of this contention, State Farm points out that (1) Quinley's doctors never imposed any permanent restrictions on her ability to perform any major life activity or any job task and (2) an independent "fitness for duty" examination and work capacity evaluation conducted before Quinley returned to work in January, 1995, an

examination and evaluation recommended by her own doctor, concluded with a finding that she could perform all her job duties as a mail and file clerk with no restrictions. See Abroms Exhs. 22, 23A, 23B, & 24. In response, Ms. Quinley argues that her bulging discs prevent her from "bending, lifting or stooping," thus rendering her disabled.

In considering whether Ms. Quinley's disc impairment constituted a disability at the times relevant to her complaint, the Court must first examine whether the impairment substantially limited a major life activity other than working. In this connection, the Court notes, that Ms. Quinley's response to State Farm's summary judgment motion contains no assertion that she cannot "perform the normal activities of daily living." Furthermore, in her August 9, 1995 deposition, she stated that her daily activities include "cleaning house," preparing meals, visiting friends and caring for three young dogs. She also stated that she rides a bicycle and that, subsequent to her discharge from State Farm, she had been walking up to three miles a day until she developed phlebitis in her feet.

As against this, is Ms. Quinley's assertion that she cannot bend, lift or stoop. In support of this assertion, Quinley provides some medical records and several letters written by her orthopedist, Dr. Joe B. Ray. Ms. Quinley's medical records confirm that she has mild bulging in her lumber vertebrae. Furthermore, Dr. Ray's letters evidence certain restrictions on Ms. Quinley's activities. Pertinent portions of those letters follow:

> Regenia Quinley has been under my care following a motor vehicle accident and was not able to work from 9/13/93 to 98/17/93.
> Dr. Ray Letter, Sept. 20, 1993.

> Regenia Quinley has been under my care for strain of her back following a motor vehicle accident on 8/20/93. She has not been able to work since 9/29/93. She can return to work on 11/22/93.
>
> Dr. Ray Letter, Nov. 22, 1993.

> I feel that although Ms. Quinley is largely improved from the aggravating factors of the accident of August 1993... She certainly has a tendency toward easy aggravation, easier aggravation than before. She does have at least three bulging lumbar disc (sic) which may eventually require additional investigation and treatment. I recommend that she not be expected to do any heavy lifting. She will have to be extremely careful about excessive bending and positioning. She needs to get up and move around fairly frequently in order to avoid stiffness and strain in the lower back.
>
> Dr. Ray Letter, Jan. 26, 1994.

Regenia Quinley has minimal bulging disc (sic)... There was no evidence of a disc herniation. All o this has been aggravated by a motor vehicle accident that she was involved in. She is doing much better but still has episodes of distress from the waist up, and this is aggravated by bending and lifting. She does okay with sitting because she gets up and down frequently, but lifting really throws her into a spasm.

> I feel that she is largely improved from the aggravating factors of the accident of August 1993 but she does have a tendency toward easy aggravation. She does have at least three bulging lumbar disc which may eventually require additional investigation and treatment. I recommend that she not be expected to do any excessive bending and positioning. She needs to get up and move about fairly frequently to avoid stiffness and strain in the low back.
>
> If there is any further question about her condition I would recommend that she have a functional capacities evaluation.

Dr. Ray Letter, Feb. 25, 1994.

> Regenia Quinley was seen and examined by me. She should continue to have the restriction on her work keeping her from doing excessive bending and heavy lifting.

Dr. Ray Letter, May 19, 1994.

> Regenia Quinley is under my care for her fractured foot. She will need to stay off work until I see her back on 10/6/94. A return to work date will be determined at that time.

Dr. Ray Letter, Sept. 29, 1994.

> Regenia Quinley may return to light duty work on 10/10/94. She should not be expected to do prolonged walking or constant

standing, squatting, climbing stairs, ladders. She needs to wear this comfort cast.

Dr. Ray Letter, Oct. 6, 1994.

Regenia Quinley was seen and examined by me on September 15, 1994 for navicular fracture of her left foot sustained on September 13, 1994 when a swing fell on her. She was put on crutches, placed in a cast walker boot, and given Cataflam 50mg to take tid. Ms. Quinley stated that she was already of work for a sleep disorder.

Ms. Quinley was last seen by me on October 6, 1994. She was still having a good bit of swelling, discomfort, and pain, but was tolerating her Comfort cast well. X-rays showed incomplete healing of the avulsion fractures. She was given a note to return to light duty work on October 10, 1994. She should not be expected to do prolonged walking, constant standing, any squatting, climbing stairs or ladders. She would need to continue to wear the Comfort cast. I will be seeing her back in three weeks for reevaluation.

Dr. Ray Letter, Oct. 12, 1994.

The Court is not impressed with Ms. Quinley's evidence. Initially, the Court notes that all of her supporting letters are dated subsequent to her June 1993 reassignment from secretary to mail and file clerk and to her third motor vehicle accident. Thus, Ms quinley has produced no evidence that she was subject to physical restrictions at the time of her job reassignment.

Second, the restrictions in Dr. Ray's October 6th and 12th, 1994 letters relate not to Ms. Quinley's back but to her fractured foot, a temporary injury which is not, and cannot be, the basis of her ADA claims. See Vande Zande v. Wisconsin Dep't of Admin, 44 F.3d 538, 544 (7th Cir. 1995) ("Intermittent, episodic impairments are not disabilities, the standard example being a broken leg."). Finally, all the letters submitted by Ms. quinley are dated earlier than the independent "fitness for duty" examination and work capacity evaluation that were conducted before she returned to work in January 1995 and which concluded with the finding that she could perform all the duties of a mail and file clerk without restrictions.

In view of the above, the Court finds that Ms. quinley's back condition does not substantially limit a major life activity other than working. Accordingly, the next inquiry is into whether her condition substantially limits the major life activity of working. In this regard, Ms. Quinley contends that she could perform all her duties as a mail and file clerk without difficulty except for putting away heavy supplies and

shifting files. This assertion is unavailing, however, because the inability to perform some aspects of a job while retaining the ability to perform the work in general does not amount to a substantial limitation on the activity of working. See Dutcher, 53 F.3d at 727. Also, Ms. Quinley has produced no evidence that she is "restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes" as is required to show a substantial limitation on work activity. See 29 C.F.R. § 1630.2(j)(2)(i).

In sum, while Quinley "may consider (herself) disabled, as that term is frequently used (.) Congress offered narrower relief to a more seriously deprived class of persons, when enacting the ADA." O'Dell v. Altec Industries, Inc., No. 94-6180-CV-SJ-6, 1995 WL 611341, *4 (W.D.Mo. Octo 16, 1995)(plaintiff not disabled under ADA although he was restricted to lifting no more than thirty-five pounds frequently and no more than fifty pounds occasionally because of back injury; court granted summary judgment for defendant employer); see Ray v. Glidden, _F.3d _, 1996 WL 284978, (5th Cir. June 14, 1996) (plaintiff's inability to perform continuous, heavy lifting did not render him disabled

under the ADA); Wernick v. Federal Reserve Bank of New York, No. 93 Civ. 2606, 1995 WL 598973 (S.D.N.Y. Oct. 10, 1995) (employee with bursitis and cervical and lumber spasms with restriction of "no prolonged sitting" is not disabled under the ADA; "an impairment does not substantially limit a person's ability to work if it disqualifies her from only a narrow range of jobs;" summary judgment granted); Lowe v. Angelo's Italian Foods, Inc., No. 93-1233, 1994 WL 675027 (. Kan. Nov. 18, 1994) (as a matter of law, lifting restriction of no greater than fifteen pounds and then only on occasional basis, restriction on climbing stairs, and need to sit occasionally did not substantially limit any of plaintiff employee's major life activities); Otis v. Canadian Valley-Reeves Meat Co., 884 F. Supp. 446 (W.D. Okal 1994), aff'd, 52 F.3d 338 (10th Cir 1995)(seventy pound lifting restriction not restriction of any major life activity, including work, thus plaintiff not disabled within meaning of ADA; summary judgment granted for defendant).

III. CONCLUSION

In light of the foregoing, the Court concludes that Ms. Quinley's back condition does not constitute a disability for purposes of the ADA.

Thus, she cannot make out a prima facie case of disability discrimination under the Act. Therefore, State Farm's motion for summary judgment (tab 12) is due to be and hereby is, **GRANTED**. Accordingly, **FINAL JUDGMENT** is hereby **ENTERED** in favor of defendant State Farm and against plaintiff Regenia Quinley on her ADA claims. Ms. Quinley shall have and recover **NOTHING** from State Farm on these claims, and the claims are hereby **DISMISSED with prejudice**. Each party will bear its own costs.

DONE this the 26 day of June, 1996.

Supreme Court, U.S.
FILED
NOV 10 1997
CLERK

(2)

No. 97-647

In The

Supreme Court of the United States

October Term, 1997

REGENIA F. QUINLEY,

Petitioner,

vs.

STATE FARM INSURANCE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals correctly affirm the district court's decision granting summary judgment in favor of respondent State Farm on petitioner Regenia Quinley's claims under the *American's with Disabilities Act*?

PARTIES

The parties are as follows:

Petitioner: Regenia F. Quinley.

Respondent: State Farm Mutual Automobile Insurance Company, incorrectly identified in the complaint as State Farm Insurance Corporation. State Farm Fire and Casualty Company, State Farm General Insurance Company and State Farm Life Insurance Company are affiliated companies.

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RESPONDENT'S BRIEF IN OPPOSITION

Quinley's petition does not cite a reason for review under *Supreme Court Rule* 10, nor does it cite any other "compelling" reason for review by this Court. The petition characterizes the "questions presented" as whether the courts below "effectively ruled" that

> the *American's with Disabilities Act* does not prohibit or restrict the removal of reasonable accommodations afforded to a qualified individual [with a disability] so as to cause that . . . individual working with reasonable accommodations to lose [her] employment.

Quinley's statement of the issue is contrived. It has nothing to do with the uncontroverted facts in the record or the decision of the courts below.

Clearly, if a reasonable accommodation is required to enable an otherwise qualified disabled individual to perform the job, the employer must provide (or continue to provide) the accommodation absent undue hardship on the employer's business. 42 U.S.C. §§ 12111(a), 12112(a) and 12112(b)(5)(A). Neither the district court nor the court of appeals held otherwise.

In substance, Quinley simply asks this Court to conduct a *de novo* review of the record to determine whether the court of appeals and the district court correctly concluded that there was no genuine issue of material fact and that State Farm was entitled to a judgment as a matter of law. *Fed.R.Civ.P.* 56.

OPINIONS BELOW

The district court's order granting summary judgment is unreported. A copy of the order is reproduced in *Appendix A*. The decision of the court of appeals affirming the district court's decision without opinion is reported at 113 F.3d 1251 (11th Cir. 1997).

STATUTES

The relevant rules, statutes and regulations, which are set forth verbatim in *Appendix B*, are as follows:

1. *American's with Disabilities Act* (Subchapter I), 42 U.S.C. §§ 12111 through 12117.

2. *Fed.R.Civ.P.* 56.

3. *Eleventh Circuit Rule* 36-1.

STATEMENT OF THE CASE[1]

From 1985 until June 1993, State Farm employed Quinley as a claims secretary, a job that entailed clerical and support work for five State Farm claims representatives and, occasionally, putting away supplies.

Quinley's alleged "disability" consists of three minimally bulging discs, an injury she sustained in a 1986 car

[1] The "Statement of the Case" in the petition misstates certain facts in the record, fails to present material facts, and distorts the chronology of material facts. *See* Supreme Court Rules 14.1(g), 15.1 and 24.2.

accident. Following two subsequent car accidents, one in mid-1992 and one in August 1993, Quinley suffered occasional back pain and her doctor periodically advised her to avoid "heavy lifting." Notwithstanding her bulging discs, and a multitude of other maladies (*e.g.* sinusitis; bladder infections; bronchitis; TMJ and related headaches; a broken hand; a broken foot; a sleep disorder; psychological problems) that resulted in several hundred days of absences over the years, Quinley satisfactorily performed all of her job duties. No doctor ever imposed any permanent or long term restrictions on Quinley's ability to perform any job duty or to engage in any major life activity.

In June 1993, Quinley was laterally reassigned to a job as a mail and file clerk as part of a reorganization of office personnel prompted by the demotion of another employee. There were two other mail and file clerks. Although Quinley occasionally put away supplies, the same job she occasionally performed as a secretary, that particular job was regularly performed by one of the other mail and file clerks.

When Quinley was assigned to the clerk's job, there were no restrictions on her ability to perform any of the job duties. She *never* complained to anyone about the reassignment, and she *never* asked to return to her former job. Indeed, Quinley testified that she "liked" her new job, and that she "didn't want to go back" to her former job.

Two months after the reassignment, Quinley wrecked her car for the third time, causing a recurrence of the back pain she suffered after her first two car accidents. Her

orthopedist noted that she had "minimal posterior bulges of three discs" and treated her for back "strain." The orthopedist subsequently released Quinley to return to work as a mail and file clerk with no restrictions.

In mid-January 1994, Quinley had her first and only conversation with a supervisor about alleged difficulty performing one job duty – putting away heavy supplies. When Quinley told her supervisor that putting away these supplies hurt her back, he "accepted it," and told her

> that she was the best judge of what she could do and couldn't do, and that, if she had something to lift, [he] would either do it, or [he would] see that someone else could do it for her.

A week later, Quinley delivered a note from her orthopedist stating that "she should not be expected to do any *heavy* lifting," and that she needed to be "extremely careful about *excessive* bending and positioning." Upon receiving the note, Quinley's supervisor reiterated that she was not to perform any job that involved lifting, "then or at any time."

> Regenia, if you have a problem let me know, you're the best judge. I'll either do it myself or I will get someone else to do it. You don't need to be lifting.

Quinley was never again required to put away heavy supplies.

In July 1994, more than one year after her assignment to the clerk's job, Quinley began an extended medical leave for a sleep disorder. Her leave was prolonged when she broke her hand and later fractured her foot.

In October 1994, shortly after Quinley exhausted 100 days of paid sick leave, she reported to work and announced that she was ready to return despite a noticeable limp and a cast on her fractured foot. She produced a doctor's certificate imposing temporary restrictions on her ability to engage in "prolonged walking or constant standing, squatting, climbing stairs [and] ladders." Quinley did not ask to return to her former job as a secretary. She sought only to return to her job as a mail and file clerk.

Because of Quinley's previous back problems, her extended leave for a sleep disorder, a history of psychological problems, her broken hand and fractured foot, State Farm required Quinley to undergo an independent "fitness for duty" evaluation before returning to work. Quinley underwent the evaluation and was released to return to work as a mail and file clerk with no restrictions on her ability to perform any job duty. She returned to work in January 1995.[2]

Because Quinley had missed *several hundred work days* during the preceding three years, most of which was unrelated to her alleged disability, she was advised that her attendance would have to improve. It did not. During the first two weeks after she returned, Quinley missed 3½ work days, all for reasons unrelated to her back condition (*e.g.* headaches, diarrhea, sores in her mouth,

---

[2] Between the time Quinley first sought to return to work as a mail and file clerk and her successful completion of the fitness for duty evaluation, she filed her only EEOC charge of discrimination claiming that she had been denied reinstatement because of her alleged disability.

blisters in her mouth, a sore throat). She was discharged in February 1995 for continuing chronic absenteeism. She did not file an EEOC charge on her discharge.

Quinley sued State Farm claiming that she had been reassigned to the mail and file clerk job in June 1993 because of her alleged disability, and that she was denied reinstatement in October 1994 for the same reason. The district court granted summary judgment, primarily on the ground that Quinley did not have a "disability" covered under the *ADA*. The court of appeals affirmed without opinion, concluding that summary judgment was "supported by the record" and that "an opinion would have no precedential value." *Eleventh Circuit Rule* 36-1.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

This Case Does Not Involve the Question Presented In Quinley's Petition.

Quinley's petition suggests that summary judgement on her *ADA* claims "constitute[s] in effect a ruling" that the *ADA* does not prohibit an employer from removing a reasonable accommodation previously provided to a qualified disabled individual, "resulting in [her] loss of employment." This is pure fabrication. Quinley's characterization of the issue misstates the decision of the district court and disregards the uncontroverted facts.

First, neither the district court nor the court of appeals held that an employer could eliminate a previously provided reasonable accommodation, thereby rendering a qualified disabled individual unable to perform the job. On the contrary, the courts concluded that Quinley was not an individual with a "disability" under the *ADA*. The periodic limitations on her ability to perform heavy lifting (limitations imposed after each of her three car accidents) did not substantially limit a major life activity, including her ability to work. *See e.g. Williams v. Channel Master, Inc. Satellite Sys.*, 101 F.3d 346, 349 (4th Cir. 1996) (As a matter of law, a 25-pound lifting limitation – particularly when compared to an average person's abilities – did not constitute a significant restriction on one's ability to lift, work, or perform any other life activity under the *ADA*.). In concluding that Quinley did not have a "disability," the district court and the court of appeals simply applied well settled law to the uncontroverted facts in the record.

Second, Quinley's issue bears no relationship to the facts. She was not assigned to a secretarial job as a reasonable accommodation for her purported disability. She was hired to perform that job and did so satisfactorily for seven years, *albeit* with excessive absenteeism for a spate of reasons. She was assigned to a mail and file clerk's job in June 1993 for reasons unrelated to her alleged disability. At that time, there were no restrictions on her ability to perform any job duty or to engage in any major life activity. Thereafter, Quinley *never* asked to be returned to her old job because she "liked" her new job and "didn't want to go back." Following her extended leave of absence for a sleep disorder, Quinley sought to

return to work as a mail and file clerk, not as a secretary. After a fitness for duty evaluation established that Quinley could return to her job as a mail and file clerk *with no restrictions* on her ability to perform any job duties, she returned to work. Her subsequent discharge for chronic absenteeism had nothing to do with her physical ability to perform her job duties. In sum, the argument that Quinley should have been allowed to remain in, and later to return to, her former job as a secretary as a "reasonable accommodation" for an alleged disability was conjured-up by her attorney.[3]

Finally, even if Quinley were a qualified individual with a disability, the only accommodation she ever needed was to be relieved of one job duty – putting away heavy supplies. Her supervisor granted that accommodation. She was instructed never to perform heavy lifting. Having effectively "accommodated" Quinley's alleged disability, State Farm was required to do nothing more. 29 C.F.R. § 1630 *Appendix* (EEOC *Interpretive Guidelines*) ("the employer providing the accommodation has the ultimate discretion to choose between effective accommodations."); *EEOC Technical Assistance Manual* § 3.10.5.

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[3] Quinley did not file an EEOC charge challenging her discharge. The district court correctly concluded that any claim related to her discharge under the *ADA* was barred because she failed to fulfill the statutory prerequisites for such a claim. *Appendix A* at A-6-A-8.

II.

The Courts Below Correctly Applied the Standards for Granting Summary Judgment.

In reality, Quinley asks this Court to conduct a *de novo* review of the record to determine whether the district court and the court of appeals correctly concluded that there was no genuine issue of material fact and that State Farm was entitled to a judgment as a matter of law. *Fed.R.Civ.P.* 56. Her petition implies that the courts did not correctly apply the appropriate standards for granting summary judgment. She is wrong.

The district court cited and applied the correct standards for granting summary judgment under *Fed.R.Civ.P.* 56. *See Appendix A,* "Standard of Review." *Citing Eleventh Circuit Rule* 36-1, the court of appeals concluded that summary judgment was "supported by the record," and affirmed without opinion. 113 F.3d 1251.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be *denied*.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

REGINIA [sic] F. QUINLEY,

Plaintiff,

v. **CIVIL ACTION NO. 95-0271-RV-C**

STATE FARM INSURANCE CORP.,

Defendant.

ORDER

In this case, plaintiff Reginia [sic] F. Quinley charges that defendant State Farm Insurance Corporation ("State Farm") discriminated against her in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* The matter is presently before the Court on State Farm's motion for summary judgment and supporting brief (tabs 12 & 13). Ms. Quinley has filed a response in opposition to defendant's motion. *See* tabs 24, 25 & 26. State Farm has filed a reply (tab 27) along with a "motion to strike the affidavit of plaintiff Reginia [sic] Quinley" (tab 28).

This case is also before the Court on State Farm's "motion for continuance of pretrial conference" (tab 29). Ms. Quinley filed a response (tab 30) in opposition to this motion. Subsequently, however, Ms. Quinley withdrew her objection and consented to the continuance. *See* tab 31. The Court will address these motions in logical order.

I. BACKGROUND[1]

State Farm's claims office in Mobile, Alabama, hired Ms. Quinley as a claims secretary in 1985. She remained in that position until June 1993, when she was assigned to a job as a mail and file clerk. In late July 1994, Ms. Quinley began a continuous medical leave of absence for a sleep disorder. She asked to return to work on October 10, 1994, but State Farm delayed her return until it obtained an independent "fitness for duty" evaluation to determine her ability to perform her job duties. Ms. Quinley returned to work on January 16, 1995 but was terminated approximately three weeks later on February 6, 1995.

During the time she was employed by State Farm, Ms. Quinley experienced a wide variety of physical and psychological problems. The most significant of these was pain stemming from a back injury sustained in a September 1986 automobile accident, and aggravated in

---

[1] In compliance with the Local Rules of this Court, State Farm has filed proposed findings of fact along with its motion for summary judgment. In her response to the motion, Ms. Quinley does not set forth her own version of the facts or dispute any of State Farm's factual allegations. Furthermore, the only evidentiary materials Ms. Quinley has submitted are copies of certain medical records and doctor's letters which State Farm had already filed and her own affidavit with an attached exhibit. State Farm has moved (tab 28) to strike certain portions of Ms. Quinley's affidavit. After careful consideration, the Court finds that the motion to strike (tab 28) is due to be, and hereby is, **GRANTED** for the reasons set forth in State Farm's motion. In light of the foregoing, the statement of facts set forth in this order are drawn largely from State Farm's proposed findings of fact and the supporting materials filed therewith.

two subsequent car accidents in August 1992 and September 1993. In addition to the back injury, Ms. Quinley suffered a broken hand, migraine headaches, periodic chest congestion and bronchitis, "pathological grief reaction," depression, multiple syncopal episodes, diarrhea, abdominal cramps, sinusitis, high blood pressure, and a host of other ailments.

Ms. Quinley's medical and psychological problems caused her to be absent from work frequently. In 1990, these problems caused her to miss all or part of 34 work days; in 1991, all or part of 27 work days; and in 1992, all or part of 60 work days. In 1993, Ms. Quinley was absent all or part of 40 work days before her third automobile accident occurred in September 1993.

On July 25, 1994, she began a 2½ month medical leave because of a sleep disorder. While on medical leave, Ms. Quinley fell off a swing at home and fractured her foot, requiring an extension of her leave. Between her third car accident in September 1993 and when she first sought to return to work from medical leave on October 10, 1994, Ms. Quinley missed all or part of 177 work days.

On October 14, 1994, Ms. Quinley filed a charge of disability discrimination with the Equal Employment Opportunity Commission ("EEOC") asserting the following:

> I. I was hired by [State Farm] in November 1985. I have been denied reasonable accommodations and on October 10, 1994 was denied the opportunity to return to work following a medical leave of absence.

II. No reasons have been offered for these actions.

III. I believe I have been discriminated against because of my disability, in violation of the Americans with Disabilities Act, in that I was treated in this manner.

On February 7, 1995, the EEOC issued Ms. Quinley a "notice of right to sue." On April 3, 1995, she commenced the instant action.

II. DISCUSSION

A. Jurisdiction

The Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391(b).

B. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Rice v. Branigar Org., Inc.*, 922 F.2d 788, 790 (11th Cir. 1991). The clear language of Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden

of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

> The party moving for summary judgment
>
> > bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991); *see Mercantile Bank & Trust Co. v. Fidelity & Deposit Co.*, 750 F.2d 838 (11th Cir. 1985). The mere existence of a scintilla of evidence in support of the nonmovant's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). At all times, however, the Court must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences and resolving all reasonable doubts in her favor. *Addickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Barnes v. Southwest Forest Indus.*, 814 F.2d 607, 609 (11th Cir. 1987).

C. Conclusions of Law

1. Scope of ADA claim

The ADA is a federal statute that prohibits employment discrimination against disabled individuals. Title I

of the ADA, under which Ms. Quinley's claims fall, incorporates by reference the enforcement mechanisms provided for in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* *See* 42 U.S.C. § 12117(a). A claimant who wishes to bring a Title VII action in federal court must first file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e). Title VII further provides that "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved" within ninety days of receipt of a "right-to-sue" letter from the EEOC. 42 U.S.C. § 2000e-5(f)(1).

Although the timeliness of filing an EEOC charge is in the nature of a statute of limitations, *see Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), the act of filing is a jurisdictional prerequisite to the commencement of a Title VII, or ADA, suit in federal court, *see Thomas v. Kroger Co.*, 24 F.3d 147, 150 (11th Cir. 1994). Thus, unless a plaintiff has filed a charge with the EEOC and received a right to sue letter, the district court lacks subject matter jurisdiction to hear that plaintiff's ADA claim. *See Stewart v. County of Brown*, ___ F.3d ___, No. 95-2776, 1996 WL 313212 (7th Cir. June 12, 1996); *McSherry v. Trans World Airlines, Inc.*, 81 F.3d 739 (8th Cir. 1996); *Redlich v. Albany Law School of Union University*, No. 94-CV-1021, 1995 WL 581244, at *2 (N.D.N.Y. Oct. 3, 1995).

Here, State Farm accurately notes that although Ms. Quinley has received a right to sue letter, the precise claims of disability discrimination covered by the letter or by the complaint are unclear. Consequently, State Farm

articulates what it perceives are all the claims Ms. Quinley could possibly be intending to assert here. These are: (1) a claim that her reassignment from claims secretary to mail and file clerk in June 1993 was discriminatory because while she could perform the duties of the former position, her back condition prevented her from performing certain duties of the latter; (2) a claim that State Farm discriminated against her by delaying her return to work after her 1994 medical leave of absence; and (3) a claim that her termination on February 6, 1995 was discriminatory.

Having thus stated Ms. Quinley's potential claims, State Farm contends that only the second is properly before the Court. Specifically, State Farm argues that the first potential claim is time barred because Ms. Quinley filed her only EEOC charge on October 14, 1994, well over 180 days after her June 1993 reassignment and that the third potential claim is barred because Quinley never filed an EEOC charge related to her discharge.

The Court finds State Farm's articulation of the possible claims here helpful, but disagrees with defendant regarding the viability of the first potential claim stated. It is inferable from Ms. Quinley's EEOC charge, and clear from her complaint, that she is asserting that State Farm denied her a reasonable accommodation for her alleged disability by its ongoing failure or refusal to reassign her to her old secretarial position. The first potential claim set forth above is merely a statement that her removal from that position in the first place was discriminatory. As such, it states a claim of alleged discrimination that was ongoing at the time Ms. Quinley filed her EEOC charge and, thus, it is not time barred. *See Stewart*, 1996 WL at *3

("In order to benefit from the "continuing discrimination" theory, [a plaintiff] must show that the alleged untimely act (the transfer) and the timely act (the failure to accommodate his physical disability) are 'related enough to constitute a continuing violation.' ") (quoting *Selan v. Kiley*, 969 F.2d 560, 564-65 (7th Cir. 1992)).

The Court concurs with State Farm regarding the third potential claim, however. Ms. Quinley was fired on February 6, 1995, which was not only several months after she filed her EEOC charge, but also only one day before the EEOC issued her a notice of right to sue. Obviously, that right to sue letter could not cover a claim for her discharge.

Thus, the Court finds that it has two ADA claims before it. First, that State Farm discriminated against Ms. Quinley by removing her from her secretarial position and failing to accommodate her alleged disability by reassigning her to that position. Second, that State Farm discriminated against Ms. Quinley by delaying her return to work following her 1994 medical leave of absence.

2. Prima facie case under the ADA

The ADA provides that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual [in any of the] terms, conditions [or] privileges of employment." 42 U.S.C. § 12112(a). Indeed, the ADA requires such employers to provide reasonable accommodations for known disabilities unless doing so would result in an undue hardship on the employer. 42 U.S.C.

§ 12112(b)(5)(A). "In order to establish a *prima facie* case of discrimination in violation of the ADA, a plaintiff must prove that (1) she has a disability; (2) she is a qualified individual; and (3) she was subjected to unlawful discrimination because of her disability." *Morisky v. Broward County*, 80 F.3d 445, 447 (11th Cir. 1996).

A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds." 42 U.S.C. § 12111(8). A "disability" is "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment." 42 U.S.C. § 12102(2). The ADA does not define such terms as "physical or mental impairment," "major life activity," or "substantially limits." Instead, these definitions are found in the regulations Congress directed the EEOC to issue to implement the statute. *See* 42 U.S.C. § 12116 (providing EEOC with authority to issue implementing regulations); 29 C.F.R. Pt. 1630, Appendix to Part 1630 – Interpretive Guidance to Title I of the ADA.

Under the EEOC regulations, "physical impairment" is defined as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." 29 C.F.R. § 1630.2(h)(1). "Mental impairment" means "[a]ny mental or psychological disorder, such as

mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2). "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. 1630.2(i).

"If an individual is not substantially limited[2] with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." 29 C.F.R. § 1630, App., § 1630.2(j) (explanatory footnote added). "To determine whether a person is substantially limited in major life activity other than working, we look to whether that person can perform the normal activities of daily living." *Ray v. Glidden*, No. 95-11162, 1996 WL 284978 (5th Cir. June 14, 1996); *see Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 & n.11 (5th Cir. 1995) (plaintiff who sustained serious injury to arm in gun accident not disabled under

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[2] The term substantially limited means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the population can perform the same major life activity.

29 C.F.R. 1630.2(j)(i) & (ii).

ADA where she could "feed herself, drive a car, attend her grooming, carry groceries, wash dishes, vacuum, and pick up trash" and attend to "all of the basic things" but where she was restricted from heavy lifting and repetitive rotational movements, and could not "pick up little things from the floor, . . . ha[d] trouble holding things up high or real tight for long periods of time, and . . . sometimes ha[d] problems turning the car's ignition"). With respect to the major life activity of working,

> [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3).

The primary ground on which State Farm seeks summary judgment here is its assertion that Ms. Quinley is not disabled for purposes of the ADA. Although Ms. Quinley suffered a multitude of illnesses and injuries during the time she worked for State Farm, her ADA claims are founded on her back problem. State Farm concedes that Ms. Quinley's bulging discs constitute a physical impairment, but contends that she cannot produce evidence that her impairment "substantially limits" any major life activity, including her ability to work.

In support of this contention, State Farm points out that (1) Quinley's doctors never imposed any permanent

restrictions on her ability to perform any major life activity or any job task and (2) an independent "fitness for duty" examination and work capacity evaluation conducted before Quinley returned to work in January, 1995, an examination and evaluation recommended by her own doctor, concluded with a finding that she could perform all her job duties as a mail and file clerk with no restrictions. *See* Abroms Exhs. 22, 23A, 23B, & 24. In response, Ms. Quinley argues that her bulging discs prevent her from "bending, lifting or stooping," thus rendering her disabled.

In considering whether Ms. Quinley's disc impairment constituted a disability at the times relevant to her complaint, the Court must first examine whether the impairment substantially limited a major life activity other than working. In this connection, the Court notes that Ms. Quinley's response to State Farm's summary judgment motion contains no assertion that she cannot "perform the normal activities of daily living." Furthermore, in her August 9, 1995 deposition, she stated that her daily activities include "cleaning house," preparing meals, visiting friends and caring for three young dogs. She also stated that she rides a bicycle and that, subsequent to her discharge from State Farm, she had been walking up to three miles a day until she developed phlebitis in her feet.

As against this, is Ms. Quinley's assertion that she cannot bend, lift[3] or stoop. In support of this assertion,

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[3] Ms. Quinley's own evaluation of her lifting capability is that she could lift objects weighing ten pounds but that anything over twenty pounds aggravated her back.

Quinley provides some medical records and several letters written by her orthopedist, Dr. Joe B. Ray.[4] Ms. Quinley's medical records confirm that she has mild bulging in her lumber [sic] vertebrae. Furthermore, Dr. Ray's letters evidence certain restrictions on Ms. Quinley's activities. Pertinent portions of those letters follow:

> Regenia Quinley has been under my care following a motor vehicle accident and was not able to work from 9/13/93 to 9/17/93.

Dr. Ray Letter, Sept. 20, 1993.

> Reginia [sic] Quinley has been under my care for strain of her back following a motor vehicle accident on 8/20/93. She as [sic] not been able to work since 9/29/93. She can return to work on 11/22/93.

Dr. Ray Letter, Nov. 22, 1993.

> I feel that although Ms. Quinley is largely improved from the aggravating factors of the accident of August 1993 . . . She certainly has a tendency toward easy aggravation, easier aggravation than before. She does have at least three bulging lumbar disc (sic) which may eventually require additional investigation and treatment. I recommend that she not be expected to do any heavy lifting. She will have to be extremely careful about excessive bending and positioning. She needs to get up and move around fairly

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[4] Ms. Quinley has also filed her own affidavit. However, the Court has already granted State Farm's motion to strike substantial portions of Ms. Quinley's affidavit. *See supra* footnote 1.

frequently in order to avoid stiffness and strain in the lower back.

Dr. Ray Letter, Jan. 26, 1994.

Reginia [sic] Quinley has minimal bulging disc (sic) . . . There was no evidence of a disc herniation. All of this has been aggravated by a motor vehicle accident that she was involved in. She is doing much better but still has episodes of distress from the waist up, and this is aggravated by bending and lifting. She does okay with sitting because she gets up and down frequently, but lifting really throws her into a spasm.

I feel that she is largely improved from the aggravating factors of the accident of August 1993 but she does have a tendency toward easy aggravation. She does have at least three bulging lumbar disc which may eventually require additional investigation and treatment. I recommend that she not be expected to do any excessive bending and positioning. She needs to get up and move about fairly frequently to avoid stiffness and strain in the low back.

If there is any further question about her condition I would recommend that she have a functional capacities evaluation.

Dr. Ray Letter, Feb. 25, 1994.

Reginia [sic] Quinley was seen and examined by me. She should continue to have the restriction on her work keeping her from doing excessive bending and heavy lifting.

Dr. Ray Letter, May 19, 1994.

Reginia [sic] Quinley is under my care for her fractured foot. She will need to stay off work

until I see her back on 10/6/94. A return to work date will be determined at that time.

Dr. Ray Letter, Sept. 29, 1994.

Reginia [sic] Quinley may return to light duty work on 10/10/94. She should not be expected to do prolonged walking or constant standing, squatting, squatting, climbing stairs, ladders. She needs to wear this comfort cast.

Dr. Ray Letter, Oct. 6, 1994.

Reginia [sic] Quinley was seen and examined by me on September 15, 1994 for navicular fracture of her left foot sustained on September 13, 1994 when a swing fell on her on her. She was put on crutches, placed in a cast walker boot, and given Cataflam 50mg to take tid. Ms. Quinley stated that she was already off work for a sleep disorder.

Ms. Quinley was last seen by me on October 6, 1994. She was still having a good bit of swelling, discomfort, and pain, but was tolerating her Comfort cast well. X-rays showed incomplete healing of the avulsion fractures. She was given a note to return to light duty work on October 10, 1994. She should not be expected to do prolonged walking, constant standing, any squatting, climbing stairs or ladders. She would need to continue to wear the Comfort cast. I will be seeing her back in three weeks for reevaluation.

Dr. Ray Letter, Oct. 12, 1994.

The Court is not impressed with Ms. Quinley's evidence. Initially, the Court notes that all of her supporting letters are dated subsequent to her June 1993 reassignment from secretary to mail and file clerk and to her third

motor vehicle accident. Thus, Ms. Quinley has produced no evidence that she was subject to physical restrictions at the time of her job reassignment. Second, the restrictions in Dr. Ray's October 6th and 12th, 1994 letters relate not to Ms. Quinley's back but to her fractured foot, a temporary injury which is not, and cannot be, the basis of her ADA claims. *See Vande Zande v. Wisconsin Dep't of Admin*, 44 F.3d 538, 544 (7th Cir. 1995) ("Intermittent, episodic impairments are not disabilities, the standard example being a broken leg.") Finally, all the letters submitted by Ms. Quinley are dated earlier than the independent "fitness for duty" examination and work capacity evaluation that were conducted before she returned to work in January 1995 and which concluded with the finding that she could perform all the duties of a mail and file clerk without restrictions.

In view of the above, the Court finds that Ms. Quinley's back condition does not substantially limit a major life activity other than working. Accordingly, the next inquiry is into whether her condition substantially limits the major life activity of working. In this regard, Ms. Quinley contends that she could perform all her duties as a mail and file clerk without difficulty except for putting away heavy supplies and shifting files. This assertion is unavailing, however, because the inability to perform some aspects of a job while retaining the ability to perform the work in general does not amount to a substantial limitation on the activity of working. *See Dutcher*, 53 F.3d at 727. Also, Ms. Quinley has produced no evidence that she is "restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes" as

is required to show a substantial limitation on work activity. *See* 29 C.F.R. § 1630.2(j)(2)(i).

In sum, while Quinley "may consider [herself] disabled, as that term is frequently used[,] Congress offered narrower relief to a more seriously deprived class of persons, when enacting the ADA." *O'Dell v. Altec Industries, Inc.*, No. 94-6180-CV-SJ-6, 1995 WL 611341, *4 (W.D. Mo. Oct. 16, 1995) (plaintiff not disabled under ADA although he was restricted to lifting no more than thirty-five pounds frequently and no more than fifty pounds occasionally because of back injury; court granted summary judgment for defendant employer); *see Ray v. Glidden*, ___ F.3d ___, 1996 WL 284978, (5th Cir. June 14, 1996) (plaintiff's inability to perform continuous, heavy lifting did not render him disabled under the ADA); *Wernick v. Federal Reserve Bank of New York*, No. 93 Civ. 2606, 1995 WL 598973 (S.D.N.Y. Oct. 10, 1995) (employee with bursitis and cervical and lumber [sic] spasms with restriction of "no prolonged sitting" is not disabled under the ADA; "an impairment does not substantially limit a person's ability to work if it disqualified her from only a narrow range of jobs;" summary judgment granted); *Lowe v. Angelo's Italian Foods, Inc.*, No. 93-1233, 1994 WL 675027 (D. Kan. Nov. 18, 1994) (as a matter of law, lifting restriction of no greater than fifteen pounds and then only on occasional basis, restriction on climbing stairs, and need to sit occasionally did not substantially limit any of plaintiff employee's major life activities); *Otis v. Canadian Valley-Reeves Meat Co.*, 884 F.Supp. 446 (W.D. Okla 1994), *aff'd*, 52 F.3d 338 (10th Cir. 1995) (seventy pound lifting restriction not restriction of any major life activity,

including work, thus plaintiff not disabled within meaning of ADA; summary judgment granted for defendant).

III. CONCLUSION

In light of the foregoing, the Court concludes that Ms. Quinley's back condition does not constitute a disability for purposes of the ADA.[5] Thus, she cannot make out a *prima facie* case of disability discrimination under the Act. Therefore, State Farm's motion for summary judgment (tab 12) is due to be, and hereby is **GRANTED**.[6] Accordingly, **FINAL JUDGMENT** is hereby **ENTERED** in favor of defendant State Farm and against plaintiff Reginia [sic] Quinley on her ADA claims. Ms. Quinley shall have and recover **NOTHING** from State

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[5] As previously stated, a plaintiff may be disabled for purposes of the ADA if her employer regards her as having an impairment that substantially limits a major life activity even though she has no such impairment. *See* 42 U.S.C. § 12102(2)(c). Ms. Quinley does not assert her ADA claims on this basis, however. In any event, it is clear that State Farm did not believe that Ms. Quinley was disabled under the ADA. *See* Abroms Aff. ¶ 16 (State Farm Medical Director concluded, based on "work capacity evaluation" and "fitness for duty" examination that "Ms. Quinley did not have a physical disability that substantially impaired a major life activity or that she would render her unable to perform the essential job duties of her job").

[6] State Farm's "motion for continuance of pretrial conference" (tab 29) is thus deemed **MOOT**.

Farm on these claims, and the claims are hereby **DISMISSED with prejudice**. Each party will bear its own costs.

DONE this the 26 day of June, 1996.

/s/ Richard W. Vollmer, Jr.
UNITED STATES
DISTRICT JUDGE

42 § 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employe" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees

for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include –

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry

affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include –

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modifications of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Under hardship
(A) In general

The term "undue hardship" means an action requiring significant difficulty or

expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include –

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

(Pub.L. 101-336, Title I, § 101, July 26, 1990, 104 Stat. 330; Pub.L. 102-166, Title I, § 109(a), Nov. 21, 1991, 105 Stat. 1077.)

42 § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who

has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on –

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that –

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

(Pub.L. 101-336, Title I, § 102, July 26, 1990, 104 Stat. 331; Pub.L. 102-166, Title I, § 109(b)(2), Nov. 21, 1991, 105 Stat. 1077.)

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall –

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to

the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

(Pub.L. 101-336, Title I, § 103, July 26, 1990, 104 Stat. 333.)

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§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who –

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity –

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that –

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to

such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to –

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

(Pub.L. 101-336, Title I, § 104, July 26, 1990, 104 Stat. 334.)

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§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the

applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

(Pub.L. 101-336, Title I, § 105, July 26, 1990, 104 Stat. 336)

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§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of Title 5.

(Pub.L. 101-336, Title I, § 105, July 26, 1990, 104 Stat. 336)

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§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed.Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

(Pub.L. 101-336, Title I, § 105, July 26, 1990, 104 Stat. 336)

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If no motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining

the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion

that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)